

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ANDREW RUTHERFORD,

Plaintiff,

v.

JASON McKISSACK, et. al.,

Defendants.

CASE NO. C09-1693 MJP

ORDER GRANTING SUMMARY  
JUDGMENT ON PLAINTIFF'S  
MALICIOUS PROSECUTION  
CLAIM

This comes before the Court on Defendants' motion for summary judgment (Dkt. No. 65.) Having reviewed the motion, the response (Dkt. No. 78), the reply (Dkt. No. 81), the surreply (Dkt. No. 92), and all related filings, the Court GRANTS Defendants' motion for summary judgment regarding Plaintiff's malicious prosecution claim.

**Background**

On September 9, 2007, Plaintiff Andrew Rutherford and friends Myo Thant and Jared Alfonzo were riding in a Jeep driven by Alfonzo. (Dkt. No 79-7 at 3.) Alfonzo ran a red light on Capitol Hill in front of Defendant Jonathan Chin's car, forcing Chin to brake suddenly. (Dkt. No. 61 at 9.) Chin, a Seattle Police Department ("SPD") officer, suspected the Jeep's driver of

1 driving while intoxicated (“DUI”) or recklessly, and followed the Jeep even though he was off-  
2 duty and out of uniform. (Id. at 8–9.) As Rutherford and his friends were exiting the vehicle,  
3 Chin detained them and requested fast backup (Id. at 20.) Defendant Jason McKissack was the  
4 first officer responding to Chin’s call. (Dkt. No. 60-6 at 4.) Plaintiff believed McKissack’s  
5 rapidly approaching car would hit him, and “jumped up and ran” to get out of its way. (Dkt. No  
6 60-7 at 2.) McKissack and Defendant Joshua Rurey, another responding officer, exited their cars  
7 and assisted Chin in physically restraining Plaintiff. (Id. at 25; Dkt. No. 66-2 at 29.) Rutherford  
8 was criminally charged with obstructing a public servant but the charges were eventually  
9 dismissed in July 2008.

10 Rutherford is suing Defendants for unlawful arrest, excessive force, and various state tort  
11 law violations, including malicious prosecution. Defendants sought summary judgment on all  
12 claims, which the Court granted in part and denied in part. But, with respect to the malicious  
13 prosecution claim, Defendants only raised the issue of lack of malice in their reply. The Court  
14 invited Rutherford to submit a surreply.

### 15 Analysis

16 To maintain an action for malicious prosecution, the plaintiff must allege and prove the  
17 following: (1) that the prosecution claimed to have been malicious was instituted or continued by  
18 the defendant; (2) that there was want of probable cause for the institution or continuation of the  
19 prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the  
20 proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the  
21 plaintiff suffered injury or damage as a result of the prosecution. Bender v. City of Seattle, 664  
22 P.2d 492, 496 (Wash. 1983).

1 The gist of an action for malicious prosecution rests on probable cause and malice. Id.  
2 Malice is satisfied by proving that the prosecution was undertaken from improper or wrongful  
3 motives or in reckless disregard of the rights of the plaintiff. Peasley v. Puget Sound Tug &  
4 Barge Co., 13 P.2d 681, 501 (Wash. 1942). Impropriety of motive may be established by proof  
5 that defendant instituted the criminal proceedings (1) without believing him to be guilty, or (2)  
6 primarily because of hostility or ill will toward him, or (3) for the purpose of obtaining a private  
7 advantage as against him. Id.

8 Defendants argue for summary judgment because Rutherford fails to demonstrate either  
9 want of probable cause and/or malice. The Court disagrees with respect to probable cause.  
10 When considering Rutherford's unlawful arrest claim, the Court determined a genuine issue of  
11 material fact exists as to when Rutherford was arrested and whether probable cause existed for  
12 his arrest. (Dkt. No. 91.) Nevertheless, the Defendants are correct in stating there is no evidence  
13 of malice. Rutherford argues his arrest without probable cause suggests malice. But, "want of  
14 probable cause . . . in itself will not justify [a plaintiff's] recovery of damages for malicious  
15 prosecution." Peasley, 13 P.2d at 501. "He must go further and establish malice on the part of  
16 the defendant, for want of probable cause without malice is of no avail." Id. Here, Rutherford  
17 makes no showing that criminal proceedings were instituted without believing him to be guilty of  
18 obstruction or primarily because of hostility or ill will toward him. To the extent Rutherford  
19 suggests criminal proceedings were instituted for the purposes of obtaining a tactical advantage  
20 in a possible civil action, Rutherford provides no evidentiary support for the allegation.

21 Since Rutherford fails to demonstrate improper motive or malice in instituting the  
22 criminal proceedings, the Court GRANTS Defendants' motion for summary judgment with  
23 respect to the malicious prosecution claim.

**Conclusion**

With respect to Rutherford's malicious prosecution claim, the Court GRANTS Defendants' motion for summary judgment.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 12th day of April, 2011.



Marsha J. Pechman  
United States District Judge